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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/051,765	01/17/2002	Richard J. Fitzpatrick	1932.1110-002	5555
21005	7590	02/17/2004	EXAMINER	
HAMILTON, BROOK, SMITH & REYNOLDS, P.C.			FUBARA, BLESSING M	
530 VIRGINIA ROAD			ART UNIT	PAPER NUMBER
P.O. BOX 9133				
CONCORD, MA 01742-9133			1615	

DATE MAILED: 02/17/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Offic Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/051,765	FITZPATRICK ET AL.	
Examiner	<b>Art Unit</b>		
Blessing M. Fubara	1615		

-- The MAILING DATE of this communication appars on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

1)  Responsive to communication(s) filed on 04 November 2003.

2a)  This action is **FINAL**.                    2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

4)  Claim(s) 36-50,59,60,65-71,75 and 76 is/are pending in the application.  
4a) Of the above claim(s) 59,60 and 65-71 is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 36-50,75 and 76 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a)  All    b)  Some \* c)  None of:  
1.  Certified copies of the priority documents have been received.  
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1)  Notice of References Cited (PTO-892)  
2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3)  Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 10/31/02.

4)  Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.  
5)  Notice of Informal Patent Application (PTO-152)  
6)  Other: \_\_\_\_.

## **DETAILED ACTION**

Examiner acknowledges receipt of amendment and request for extension of time all filed 11/04/03. Claims 36-50, 59, 60, 65-71, 75 and 76 are pending; and claims 59, 60, 65-71 of the pending claims are withdrawn.

### ***Information Disclosure Statement***

Examiner acknowledges receipt of the non-patent literature, references #'s AR-AS, AM2, AN2, AO2, AT-AW, AP2, AQ2, AL3, AM3, AN3, AO3, indicated as not considered in the office action of 07/01/03, is now considered. A copy of updated signed FORM 1449 is enclosed herewith.

### ***Double Patenting***

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. Claims 36-50, 75 and 76 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-8, 10 and 20-24 of copending Application No. 10/051,766, now published application number US 2003/0021761. Although the conflicting claims are not identical, they are not patentably distinct from each other because the composition used in the co-pending application to treat mucositis comprises the polymer of said claims of the examined application. The co-pending application differs from the instant application in that the claims of the co-pending application are directed to method of treating and the instant claims are directed the polymer and pharmaceutical composition that comprises the polymer. However, the method of the co-pending application utilizes a composition comprising the polymer of the instant application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Applicants argue that a product and a process of using the product are patentably distinct and do not require a terminal disclaimer. While this argument is persuasive, a terminal disclaimer is not excluded from applicants' argument.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Blessing M. Fubara whose telephone number is (571) 242-0594. The examiner can normally be reached on 7 a.m. to 3:30 p.m. (Monday to Friday).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thurman K. Page can be reached on (571) 272-0602. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Blessing Fubara  
Patent Examiner  
Tech. Center 1600

